United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

B

76-2174

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CALVIN L. TRUDO,

Appellant,

-against-

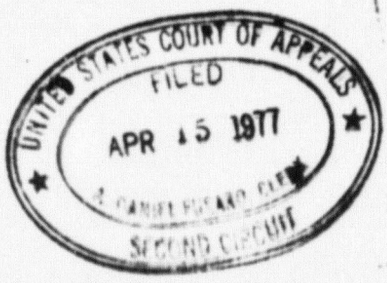
UNITED STATES PAROLE BOARD,

Appellee.

Docket No. 76-2174

PETITION FOR REHEARING
CONTAINING A SUGGESTION
FOR REHEARING EN BANC

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT



WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
CALVIN L. TRUDO
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,

Of Counsel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CALVIN L. TRUDO, Appellant, -against- UNITED STATES PAROLE BOARD, Appellee.	Docket No. 76-2174

PETITION FOR REHEARING
CONTAINING A SUGGESTION
FOR REHEARING EN BANC

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

This petition for rehearing with suggestion for rehearing en banc is made pursuant to Rule 40 of the Federal Rules of Appellate Procedure, to reconsider and vacate a judgment of a panel of this Court (Mansfield, Lumbard, and Gurfein, C.JJ.) rendered without opinion on April 1, 1977, affirming an order of the United States District Court for the District of Vermont denying a petition for writ of habeas corpus.

The critical facts are that on November 26, 1974, while appellant was on federal parole, he was arrested because he was a felon in possession of a gun. On February 10, 1975, a parole revocation warrant was issued, based on the arrest. On March 7, 1975, appellant pleaded guilty to the weapons charge, and was sentenced to 18 months in custody. Not until July 10, 1975 -- some five months after issuance of the warrant, and four months after the conviction -- was a parole violation detainer lodged at the instution, but appellant received no notice of it.

Appellant asserted that a witness who could have given favorable to him at a parole revocation hearing* died during the spring of 1975. The Board's failure to advise appellant of the lodging of the detainer and of the Board's procedures, especially of the right to present mitigating evidence, prevented appellant from preserving the evidence of the deceased witness.

The Government countered by asserting that the detainer was not lodged until July 10, aft r the witness had died, and

---

*It was alleged that the witness, Willard Rock, had overheard a conversation between appellant and the local police. Appellant asserted that in the conversation he had asked the local police for help against a man named Caputo, who was pressuring appellant for repayment of a loan. Caputo then told appellant that the loan could be covered if appellant hid some guns in his garage. Unbeknownst to appellant, Caputo was an undercover Government agent who, after appellant agreed to hide the guns, informed the FBI. Rock was the witness who could have supported appellant's assertions, but who died before appellant was able to present his evidence.

that therefore the delay in advising appellant of the Board's procedures did not cause the prejudice.

Although the panel of this Court wrote no opinion, the proceedings at oral argument show that the affirmance of the order below was based on the absence of any provision in the Board's procedures for a time within which the detainer must be lodged and the inmate notified of the issuance of the warrant. Because there was no such provision, goes the rationale, there was no violation by the Board of its own procedures and regulations.

The relevant Parole Board regulation in effect at the time of the events was 28 C.F.R. §2.53 (1975), which provided:

> In those instances where the prisoner is serving a new sentence in an institution, the warrant may be placed there as a detainer. Such prisoner shall be advised that he may communicate with the Board relative to the disposition of the warrant....[*]

Although a parole revocation hearing for a parolee who commits a new crime is delayed until after service of the intervening sentence, the Board has represented that the procedures under §2.53 prevented a loss of evidence favorable to the parolee. Government Brief at 6-7, 39, in Moody v. Daggett, Sup. Ct. No. 74-6632, and Moody v. Daggett, 97 S.Ct. 276, 279

---

*All the events in this case occurred prior to the effective date of the Parole Commission and Reorganication Act, P.L. 94-233.

n.9 (1976). Even if the procedures do provide a way of preserving evidence, what is obviously critical to their effectiveness is that the inmate be notified of his rights under the regulations within the shortest possible time so that he may take the necessary steps. Notice of the detainer and the Board's procedures is obviously the trigger for attempts to obtain, preserve, and present evidence. It follows, a fortiori, that notice cannot occur at the Board's whim.

A delay in notice makes it impossible for the parolee to collect his mitigating evidence. This results in his inability to meet his burden of proving, at the conclusion of his sentence when his liberty interest ripens, that parole should not be revoked or that he should not be returned to custody as is permitted under Morrissey v. Brewer, 408 U.S. 471 (1972). The importance of a parolee's being able to present evidence is highlighted by the Board's presumption that parole will be revoked and the parolee returned to custody with no concurrency credit unless he can present substantial mitigating evidence (RULES OF THE UNITED STATES BOARD OF PAROLE, effective January 1, 1971, at 34 (now appearing as 28 C.F.R. §2.47(c) (1976)).

In effect, the parolee is penalized by a loss of liberty resulting from his ignorance and failure to act, i.e., to collect his evidence, at a time when it is possible for him to act. See Lambert v. California, 355 U.S. 225 (1957); United States v. Mancuso, 420 F.2d 556 (2d Cir. 1970). This, of course, is the basis of the dissent in Moody, premised upon

Smith v. Hooey, 393 U.S. 397 (1969). Mr. Justice Stephens believed that a full hearing was necessary to preserve evidence of mitigation with respect to the crime. However, even though a full hearing is not constitutionally required, the reasoning of his dissent in Moody is equally applicable to the evidence preservation issue:

> If unlimited delay is permitted, the procedural safeguards which were fashioned in Morrissey to assure the parolee of a fair opportunity to present facts in mitigation and to challenge the Government's assertions will have become meaningless.
>
> Moody v. Daggett, supra, 97 S.Ct. at 300 (Stephens, J., dissenting).

Here, the Government gave no reasons why appellant was never notified of the presence of a warrant which was issued in February 1975, or of the procedures which are a consequence of the issuance of the warrant. Even if there was no reason to advise appellant of the warrant until his conviction was rendered, that latter event occurred on March 7, 1975, and the Board still did nothing to advise him of the warrant or its procedures. The witness did not die until late Spring 1975.* A timely notice would have prevented the permanent

---

*The Government stated that the witness died on May 9, 1975, although that fact appears nowhere in the record.

loss of critical evidence relevant to the most important issue before the Board at the later hearing.*

CONCLUSION

For the foregoing reasons, rehearing or rehearing en banc should be granted.

Respectfully submitted,

WILLIAM J. GALLAGHER, ESQ.,
THE LEGAL AID SOCIETY,
Attorney for Appellant
CHARLES L. TRUDO
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

PHYLIS SKLOOT BAMBERGER,

Of Counsel.

---

*The problem raised by the procedures used by the Board in this case is not resolved by the amendments to the parole statute or the newest regulations promulgated. Title 18 U.S.C. §4214(b) states that a summons or warrant issued against an alleged parole violator may be placed against the parole violator at the institution where he is in custody, that review of the detainer must be made within 180 days of notification to the Parole Commissioner of its placement, and that the parolee shall have notice of the pending review. See also 28 C.F.R. §2.47(a). However, there is no independent provision for when the parolee must be notified of his rights. Thus, even if the detainer is lodged, no review is scheduled until the Commissioner is notified. There is no provision for when that notice must be given. The parolee can then be required to wait six months for a review, and need only be told just prior to the hearing of his rights. The difficulties in collecting evidence while in custody when witnesses may be at great distances are greatly increased by the totally discretionary time provisions allowed to the Commission.